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No. OFFICE OF THE CLERK

# In the Supreme Court of the United States

EM LTD. AND NML CAPITAL, LTD.,

*Petitioners,*

v.

REPUBLIC OF ARGENTINA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

The overarching issue presented is whether a debtor nation may prevent the attachment by its creditors of assets nominally held by its central bank when the nation has, by presidential decree, elected to make those assets available to the nation for the early, selective, and voluntary repayment in full of a debt to a particular creditor. Underlying that question are four subsidiary issues, each of exceptional importance:

(1) Is the general rule recognized in *Republic of Argentina* v. *Weltover*, 504 U.S. 607 (1992), and in the legislative history of the Foreign Sovereign Immunities Act—that borrowing and repayment of money are types of commercial activities—subject to an exception if the lender lends only to sovereigns, as the court of appeals held?

(2) Does the sovereign's designation of assets in the United States (along with other assets elsewhere) by presidential decree for use in repaying a debt constitute "use" of those assets for a commercial activity in the United States?

(3) When a foreign sovereign directs its central bank to repay one of the sovereign's debts, and provides the central bank a note obligating the sovereign to repay the central bank for the assets so used (thereby recognizing that the sovereign is using assets previously not its own), has the sovereign converted those assets to its own assets sufficiently to make them available to pay the sovereign's valid debts, including debts it would prefer not to pay, such as those of petitioners?

(4) When a judicial decision rests in part on the plaintiffs' alleged failure to present evidence concerning a foreign debtor's assertion that certain assets are immune from attachment, is it legal error and a violation of due process to deny the discovery normally afforded plaintiffs on the very issues on which the court said plaintiffs had not submitted evidence?

## PARTIES TO THE PROCEEDING

The petitioners, plaintiffs-appellants below, are EM Ltd. and NML Capital, Ltd.

The respondent, defendant-appellee below, is the Republic of Argentina.

Banco Central de la República Argentina was designated an "Interested Non-Party Appellee" in the court of appeals. Because Rule 12.6 of the Rules of this Court indicates that all "parties" in the court below, other than petitioners, are considered respondents, and because the bank was expressly designated a "Non-Party" below, it appears that the bank is not formally a respondent in this Court. Nevertheless, petitioners are serving this petition on the bank as if it were a respondent, and petitioners do not object to the bank's filing of briefs in this Court as if it were a respondent.

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, EM Ltd. states that it has no corporate parent and that no publicly held company owns more than 10% of its stock.

Pursuant to Rule 29.6 of the Rules of this Court, NML Capital, Ltd. states that it has no corporate parent and that no publicly held company owns more than 10% of its stock.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (i)

PARTIES TO THE PROCEEDING ..... ii

RULE 29.6 STATEMENT ..... ii

TABLE OF AUTHORITIES ..... vii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT ..... 1

A. Argentina's Default on its Foreign Debt and Petitioners' Initiation of These Lawsuits ..... 2

B. Petitioners' Efforts to Attach and Restrain Argentina's "Unrestricted Reserves" in New York ..... 4

C. The District Court's Orders Vacating the Attachments and Restraining Orders ..... 5

D. The Court of Appeals' Decision ..... 7

REASONS FOR GRANTING THE PETITION ..... 9

I. By Directing that Unrestricted Reserves Held by the Central Bank Be Used to Repay One Creditor of Argentina, Argentina Changed the Status of

**TABLE OF CONTENTS—Continued**

**Page**

Those Reserves so as to Make Them Attachable by Other Creditors of Argentina ..... 12

II. The Second Circuit's "Commercial Activity" Analysis Cannot be Reconciled with the Decisions of Other Courts of Appeals or with the FSIA's Structure and Legislative History ..... 16

A. The Court of Appeals Misunderstood the Type and Nature of the Activity at Issue ... 17

B. The FSIA's Structure and Legislative History Show that Repaying a Loan is a "Commercial Activity" ..... 20

III. The Second Circuit's Definition of "Use" Creates a Circuit Conflict and Would Make it Impossible to Attach Loan-Repayment Assets Until it is Too Late ..... 22

IV. The Second Circuit's Refusal to Permit Discovery by Petitioners, while Holding Against Petitioners the Undeveloped Factual Record Below, Creates a Circuit Split and Violates Due Process ..... 25

CONCLUSION ..... 30

**APPENDIX A**

*EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007) ..... 1a

**APPENDIX B**

*EM Ltd.* v. *Republic of Argentina*, Nos. 03 Civ. 2507, 03 Civ. 8845, 05 Civ. 2434, Order

**TABLE OF CONTENTS—Continued**

**Page**

Vacating Attachments and Restraining Notices, Certifying the Vacatur Order for Appeal and Staying Vacatur Pending Appeal (S.D.N.Y. Jan. 24, 2006) ..... 41a

**APPENDIX C**

*EM Ltd.* v. *Republic of Argentina*, Nos. 03 Civ. 2507, 03 Civ. 8845, 05 Civ. 2434, Transcript of Proceedings (S.D.N.Y. Jan. 12, 2006) ..... 46a

**APPENDIX D**

*NML Capital, Ltd.* v. *The Republic of Argentina*, Order Denying Panel Rehearing and Rehearing En Banc, No. 06-0405-cv (2d Cir., Feb. 20, 2007) ..... 114a

**APPENDIX E**

*NML Capital, Ltd.* v. *Rep. of Argentina*, Order Denying Panel Rehearing and Rehearing En Banc, No. 06-0406-cv (2d Cir., Feb. 22, 2007) ..... 116a

**APPENDIX F**

*EM Ltd.* v. *Rep. of Argentina*, Order Denying Panel Rehearing and Rehearing En Banc, No. 06-0403-cv (2d Cir., Feb. 27, 2007) ..... 118a

**APPENDIX G**

*EM Ltd.* v. *The Republic of Argentina*, Order Staying Mandate, Nos. 06-0403-Civ, 06-0405-Civ, 06-0406-Civ (2d Cir., Mar. 14, 2007) ..... 120a

## TABLE OF CONTENTS—Continued

Page

**APPENDIX H**

28 U.S.C. § 1609 ..... 123a

**APPENDIX I**

28 U.S.C. § 1610 ..... 124a

**APPENDIX J**

28 U.S.C. § 1611 ..... 128a

**APPENDIX K**

Decree 1599/2005, with English translation ..... 130a

**APPENDIX L**

Decree 1601/2005, with English translation ..... 136a

**APPENDIX M**

Resolution No. 49, with English translation ..... 142a

**APPENDIX N**

Alejandro Rebossio, *El Gobierno se protege de los embargos*, La Nación (Feb. 5, 2004) ..... 149a

## TABLE OF AUTHORITIES

**Page(s)**

**Cases:**

*Adler* v. *Federal Republic of Nigeria*,
107 F.3d 720 (9th Cir. 1997) ..... 18

*Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*,
475 F.3d 1080 (9th Cir. 2007) ..... 28

*Af-Cap, Inc.* v. *Republic of Congo*,
383 F.3d 361 (5th Cir.),
on rehearing, 389 F.3d 503 (5th Cir. 2004),
cert. denied, 544 U.S. 962 (2005) ..... 23-25

*Alfred Dunhill of London, Inc.* v. *Republic of Cuba*,
425 U.S. 682 (1976) ..... 18

*Arriba Ltd.* v. *Petroleos Mexicanos*,
962 F.2d 528 (5th Cir. 1992) ..... 28

*Beg* v. *Islamic Republic of Pakistan*,
353 F.3d 1323 (11th Cir. 2003) ..... 19

*Blake* v. *Republic of Argentina*,
965 F.2d 699 (9th Cir. 1992) ..... 27

*Cicippio* v. *Islamic Republic of Iran*,
30 F.3d 164 (D.C. Cir. 1994) ..... 19

*Conn. Bank of Commerce* v. *Republic of Congo*,
309 F.3d 240 (5th Cir. 2002) ..... 24, 25, 27

*EM Ltd.* v. *Republic of Argentina*,
382 F.3d 291 (2004) ..... 2

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

*Fed. Ins. Co.* v. *Richard I. Rubin & Co., Inc.*,
12 F.3d 1270 (3d Cir. 1993) ..... 27

*First City, Texas-Houston, N.A.* v. *Rafidain Bank*,
150 F.3d 172 (2d Cir. 1998) ..... 9, 26

*First City, Texas-Houston, N.A.* v. *Rafidain Bank*,
281 F.3d 48 (2d Cir. 2002) ..... 26, 28

*Globe Nuclear Servs. & Supply, Ltd.* v. *AO Techsnabexport*,
376 F.3d 282 (4th Cir. 2004) ..... 18, 20

*Gould, Inc.* v. *Pechiney Ugine Kuhlmann*,
853 F.2d 445 (6th Cir. 1988),
cert. dismissed, 503 U.S. 978 (1992) ..... 26, 27

*Hammond Packing Co.* v. *State of Arkansas*,
212 U.S. 3221 (1909) ..... 30

*Hovey* v. *Elliott*,
167 U.S. 409 (1897) ..... 30

*In re Terrorist Attacks on September 11, 2001*,
349 F. Supp. 2d 765 (S.D.N.Y. 2005) ..... 28

*In re Terrorist Attacks on September 11, 2001*,
392 F. Supp. 2d 539 (S.D.N.Y. 2005) ..... 28

*Janini* v. *Kuwait Univ.*,
43 F.3d 1534 (D.C. Cir. 1995) ..... 19

*McDonald* v. *Mabee*,
243 U.S. 90 (1917) ..... 30

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

*McDonnell Douglas Corp.* v. *Islamic Republic of Iran*,
758 F.2d 341 (8th Cir.1985) ..... 19

*NML Capital, Ltd.* v. *Republic of Argentina*,
2006 WL 1294853 (S.D.N.Y. May 10, 2006) ..... 2

*Oppenheimer Fund, Inc.* v. *Sanders*,
437 U.S. 340 (1978) ..... 27

*Phoenix Consulting Inc.* v. *Republic of Angola*,
216 F.3d 36 (D.C. Cir. 2000) ..... 27

*Republic of Argentina* v. *Weltover*,
504 U.S. 607 (1992) ..... *passim*

*Richmark Corp.* v. *Timber Falling Consultants*,
959 F.2d 1468 (9th Cir. 1992) ..... 26

*Samco Global Arms, Inc.* v. *Arita*,
395 F.3d 1212 (11th Cir. 2005) ..... 18

*Santos* v. *Compagnie Nationale Air France*,
934 F.2d 890 (7th Cir. 1991) ..... 27

*Saudi Arabia* v. *Nelson*,
507 U.S. 349 (1993) ..... 10, 17, 18

*Société Internationale pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*,
357 U.S. 197 (1958) ..... 29, 30

*Sun* v. *Taiwan*,
201 F.3d 1105 (9th Cir. 2000) ..... 18, 19

## TABLE OF AUTHORITIES—Continued

Page(s)

*Trans Chem. Ltd.* v. *China Nat'l Mach. Import & Export Corp.*, 161 F.3d 314 (5th Cir. 1998) ..... 27

*Virtual Def. & Dev. Int'l Inc.* v. *Republic of Moldova*, 133 F. Supp. 2d 1 (D.D.C. 1999) ..... 19

*Walter Fuller Aircraft Sales, Inc.* v. *Republic of Philippines*, 965 F.2d 1375 (5th Cir. 1992) ..... 19

*Wolf* v. *Federal Republic of Germany*, 95 F.3d 536 (7th Cir. 1996) ..... 19

**Statutes:**

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1602 ..... 2

28 U.S.C. § 1603(d) ..... 16

28 U.S.C. § 1610 ..... 6

28 U.S.C. § 1610(a) ..... 5, 7, 10

28 U.S.C. § 1610(d) ..... 7, 11-13

28 U.S.C. § 1611(b) ..... 5, 14, 15

**Rules:**

Fed. R. Civ. P. 37 ..... 30

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

Fed. R. Civ. P. 64 ..... 4

**Miscellaneous:**

Executive Order 9751,
11 Fed. Reg. 7713 (July 11, 1946) ..... 21

H.R. 11315, 94th Cong., 1st Sess. (Dec. 19, 1975) ..... 17

H.R. REP. 94-1487,
*reprinted in* 1976 USCCAN 6604 ..... 8, 21, 22

Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 311 (2005) ..... 9

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) ..... 18

Hal S. Scott, *Sovereign Debt Default: Cry for the United States, Not Argentina*, Washington Legal Foundation, Working Paper Series No. 140 (Sept. 2006), available at http://atfa.org/resources/scott_wp.pdf ..... 12, 24

## PETITION FOR A WRIT OF CERTIORARI

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### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 473 F.3d 463. The district court's written order (App., *infra*, 41a-45a) and oral opinion (*id.* at 103a-111a) vacating the restraining notices and orders of attachment entered on behalf of petitioners are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on January 5, 2007. The court of appeals denied rehearing and rehearing *en banc* in three separate orders (App., *infra*, 114a-119a) respectively entered on February 20, 22, and 27, 2007. On May 4, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 29. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. §§ 1609-1611, are set forth at App., *infra*, 123a-129a.

### STATEMENT

Petitioners EM Ltd. ("EM") and NML Capital, Ltd. ("NML"), creditors of Argentina as bondholders of defaulted Argentine debt, sought to obtain post- and pre-judgment attachment, respectively, of $105 million in funds that they contend are property of the Republic of Argentina. The attachments were necessary because Argentina removed other assets from the United States in anticipation of and following its default on billions of dollars of external debt. The funds in question are held in accounts of the Banco Central de la República Argentina ("BCRA" or the "Central Bank") on deposit at the Federal Reserve Bank of New York.

The attached funds are a subset of assets that Argentina unilaterally designated, by way of two presidential decrees, for

its own use to make an early repayment of Argentina's debt to the International Monetary Fund ("IMF"). The decrees allocating those funds were quickly followed by a governmental resolution requiring Argentina to pay back the Central Bank for the funds allocated and used by Argentina. Despite that conduct, the Second Circuit held not only that the attached funds were not Argentina's property—and thus not subject to attachment under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*—but also that petitioners were not entitled to discovery to show that they were.

### A. Argentina's Default on its Foreign Debt and Petitioners' Initiation of These Lawsuits

Since October 2003, EM has held a judgment of more than $700 million against Argentina based on Argentina's default on certain bonds. After the Second Circuit affirmed that judgment, *EM Ltd.* v. *Republic of Argentina*, 382 F.3d 291 (2004), it became final and non-appealable on November 30, 2004. Similarly, NML has a judgment of more than $280 million on defaulted Argentine bonds, and has pending claims on bonds worth hundreds of millions of dollars more. There is no legitimate dispute that Argentina owes that face value plus very substantial interest. See *NML Capital, Ltd.* v. *Republic of Argentina*, 2006 WL 1294853 (S.D.N.Y. May 10, 2006) (granting NML summary judgment while Second Circuit appeal was pending on attachment orders).

These recovery efforts arise from Argentina's refusal to make scheduled payments on billions of dollars of external debt. After declaring a moratorium on servicing that debt in 2001, Argentina restructured it in 2005 through a paltry exchange offer that 24% of bondholders, including petitioners, did not accept (an unusually high non-acceptance rate for a sovereign debt restructuring). Argentina made it clear that it had no intention to offer anything to bondholders that did not accept its exchange offer. Argentina also continued a longstanding effort to secrete and shield its assets to prevent bondholders from using legal process to obtain the amounts they are owed. Thus,

in February 2004, Argentina's Cabinet Chief "confirmed that the assets of the country are safe from threat of attachments requested by foreign creditors." App., *infra*, 149a; see also *ibid.* (reporting that the "[r]eserves of the [Central Bank] on deposit in New York banks have been withdrawn, funds on deposit in the New York branch of Banco Nacion have been repatriated, and salaries of Argentine officials posted to other countries are being deposited in Argentina or paid in the form of cash sent via diplomatic pouch, which has immunity").

Just six months after Argentina paid off some creditors for cents on the dollar and told others to expect nothing, Argentina considered its financial situation sound enough to allow it to repay its entire $9.6 billion IMF debt ahead of schedule. To that end, President Néstor Kirchner issued two decrees on December 15, 2005 ("the Decrees"). The Decrees "allocated" all reserves held by BCRA, in excess of those necessary to back the monetary base, "for the payment of obligations" Argentina owed to multilateral lenders, including the IMF. App., *infra*, 130a-141a. The Decrees did not earmark specific reserves held by the Central Bank in any particular country, but instead created a new legal category—"Unrestricted Reserves"—to denominate all of the funds allocated, a total of approximately $8.4 billion at the time. *Id.* at 8a n.4.

The second Decree confirmed that "the current level of international reserves amply exceeds the margins necessary to maintain appropriate monetary and exchange policies" and ordered "payment of the pending debt to the [IMF]." App., *infra*, 137a. Accordingly, it "instructed" Argentina's Ministry of Economy and Production "to make, through [BCRA], full payment of the debt undertaken with the [IMF], using the aforementioned reserves." *Ibid.*

Subsequently, on December 29, 2005, the Ministry of Economy and Production issued Resolution No. 49, which directed that a nontransferable note be issued to the BCRA obligating Argentina to repay the Central Bank for the reserves the nation directed be used to repay Argentina's debt to the IMF. App.,

*infra*, 9a. Resolution 49 noted that it was "advisable to settle [Argentina's] liabilities * * * stemming from" its use of these Central Bank funds. *Id.* at 144a.

### B. Petitioners' Efforts to Attach and Restrain Argentina's "Unrestricted Reserves" in New York

Shortly after President Kirchner issued the Decrees, it was reported in the press that Argentina planned to repay its IMF debt on January 3, 2006. On December 30, 2005, before any repayment occurred, petitioners sought to secure their ability to recover on their legal claims arising from Argentina's default. Specifically, petitioners sought to encumber funds held for Argentina by the Central Bank in financial institutions in New York City. Because it turned out that the only substantial BCRA assets held at financial institutions in New York City were in accounts at the Federal Reserve Bank of New York, we refer to the $105 million in attached funds as "FRBNY funds." See App., *infra*, 3a.

Petitioners argued that the Decrees had first appropriated (or borrowed) the Central Bank's funds in excess of funds necessary to support the monetary base, and then directed that those Unrestricted Reserves be used by Argentina, preferentially, to repay one of the nation's creditors—the IMF—to the detriment of other creditors. Accordingly, the Unrestricted Reserves qualified as "property" of Argentina subject to attachment under New York law (and thus under Fed. R. Civ. P. 64).

Petitioners also argued that the FSIA did not shield the FRBNY funds. Under Section 1609 of the FSIA, a foreign state's property "shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter." Both of those exceptions, petitioners contended, authorized attachment of Argentina's Unrestricted Reserves. First, execution was permitted under Section 1611, which provides that "property of a foreign state shall be immune from attachment and execution if – (1) the property is that of a foreign central bank or monetary authority *held for its own*

*account*." 28 U.S.C. § 1611(b)(1) (emphasis added). Section 1611(b) presented no barrier to attachment, petitioners contended, because the Unrestricted Reserves were no longer being held by the Central Bank "for its own account" and instead were appropriated or borrowed by Argentina with directions that they be used to pay off Argentina's IMF debt.

Second, execution was also permitted by Section 1610(a) and (d), which state:

> The property [in the United States] of a foreign state * * * used for a commercial activity in the United States, shall not be immune from attachment * * * if – (1) the foreign state has [explicitly] waived its immunity from attachment * * *.

28 U.S.C. § 1610(a), (d) (concerning post- and pre-judgment attachment, respectively). Petitioners contended that Argentina expressly waived its immunity from attachment in the governing debt instruments. Because all of BCRA's funds in excess of those necessary to support the monetary base were allocated by Argentina to repay multilateral lenders, petitioners contended, those funds were Argentina's "property * * * used for a commercial activity in the United States" under Section 1610.

On December 30, 2005, the district court issued multiple *ex parte* orders of attachment in favor of NML and multiple restraining notices in favor of EM—all directed to property of Argentina, including property held through the Central Bank. On January 3, 2006, with the FRBNY funds already attached, Argentina repaid the IMF in full from funds held elsewhere.

### C. The District Court's Orders Vacating the Attachments and Restraining Orders

On January 6, 2006, both Argentina and the Central Bank moved to vacate the December 30 orders. Among other things, they contended that the Unrestricted Reserves (1) were BCRA property "held for its own account" under Section 1611(b)(1), even though Argentina was obligated to repay BCRA for using those funds; and (2) were not "used for a commercial activity in

the United States" under 28 U.S.C. § 1610, even though they had been designated for use to pay off one of Argentina's creditors.

On January 10, shortly after the parties had agreed to certain modifications to the attachments and restraining orders not at issue here, petitioners moved, by order to show cause, to confirm the orders as modified. Argentina and the Central Bank in turn moved to vacate the attachments and restraints. On January 12, the district court ruled that the attachments and restraining orders should be vacated. App., *infra*, 103a-113a. In explaining that ruling, Judge Griesa first offered these observations about the "big picture" presented by these appeals (*id.* at 103a-104a):

> [T]he Republic, in order to induce investors to buy the bonds, made very broad waivers of sovereign immunity, agreed to jurisdiction in this Court, and presumably that was supposed to mean something. * * * What has been demonstrated by these lawsuits is how little it means. The Republic has done everything possible to avoid the fruition of the lawsuits it agreed to have brought. * * * There's not a whimper of an idea that the Republic might pay the judgments which they really should pay. * * * [T]he Republic is doing everything possible to frustrate [collection].

Next, turning to the motions before him, Judge Griesa expressed "regret" that Argentina's waiver of immunity appeared to be "an illusion." App., *infra*, 105a. Despite acknowledging arguments "on both sides," Judge Griesa held that the Decrees did not "change [the] title to the [U]nrestricted [R]eserves," and that Argentina's repayment of IMF loans was not a "commercial activity" but instead a "governmental financial activity." *Id.* at 107a-109a. Accordingly, the district court held that the FRBNY funds were entitled to the protections of Section 1611 for funds held for a central bank's "own account." The court stayed its order pending appeal because of the "big picture" equities that heavily favored petitioners. App., *infra*, 112a.

### D. The Court of Appeals' Decision

The court of appeals agreed with the district court that funds allocated by Argentina for the early repayment of one of its creditors, the IMF, were nevertheless immune from attachment by any other creditor. After acknowledging that Argentina "indisputably waived its assets' immunity from attachment under 28 U.S.C. §§ 1610(a)(1) and (d)(1)," App., *infra*, 30a n.18, the court gave four grounds for affirming the district court.

First, the court held that the attached assets belonged to the Central Bank, not Argentina, notwithstanding the Decrees. Despite conceding that "the Decrees may have manifested the Republic's ability and willingness * * * to direct BCRA to use its assets for the benefit of the Republic," the court concluded that assets subject to those decrees—used for Argentina's benefit and at its direction—were not Argentina's property because they were not under Argentina's "control." App., *infra*, 21a. The court ignored Argentina's own acknowledgment of the change in control of the funds through its issuance of a note to repay the Central Bank.

The court's conclusion that BCRA and not Argentina controlled the attached assets was motivated primarily by considerations about the practical consequences of "conclud[ing] otherwise." App., *infra*, 21a. The court hypothesized that deeming the attached assets to be Argentina's property would "allow creditors of a foreign state to attach all of the assets of the state's central bank any time the foreign state issues directives affecting the central bank's reserves." *Ibid.* But the court ignored the fact that the very FSIA provisions under consideration safeguard all central bank funds similarly appropriated by foreign states, so long as those funds were not directed to be "used for" foreign states' "commercial activity in the United States." 28 U.S.C. § 1610(a), (d).

Second, the court held that "Use of Funds To Repay the IMF Is Not a 'Commercial Activity.'" App., *infra*, 30a. As the court correctly construed 28 U.S.C. § 1610(a) and (d), assets

cannot be attached unless they are used for a commercial activity. The court also correctly concluded that under *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 614 (1992), an activity is commercial in nature if a private party could engage in the same "type of action[]." App., *infra*, 32a. Without explaining why the relevant type of activity was borrowing from the IMF—as opposed to borrowing generally—the court noted several special features of the IMF that make borrowing from it an activity in which private actors cannot engage. The court concluded that, because only foreign sovereigns may borrow from the IMF, such borrowing involves the exercise of sovereign "'power,'" and therefore was not a commercial activity. App., *infra*, 32a (quoting *Weltover*, 504 U.S. at 614). The court did not mention, however, that the FSIA's legislative history categorizes *all* borrowing, including borrowing from "public lending institution[s]" like the IMF, as a type of commercial activity. H.R. REP. 94-1487, at 17, *reprinted in* 1976 USCCAN at 6615-6616.

Third, the court also held that the Decrees' designation of all Unrestricted Reserves as available to repay Argentina's debt to the IMF did not constitute "use[]" of the FRBNY funds. The court first observed that the FRBNY funds were not "actual[ly] use[d]" to repay the IMF—which use, of course, was forbidden at the time by restraining notices and orders of attachment. App., *infra*, 36a. Next, the court concluded that the FRBNY funds were not even "designat[ed] for use" by Argentina, *ibid.*, because, although "the Decrees [had] made *all* BCRA funds *potentially* available" for repaying Argentina's debts, there was no evidence that the FRBNY funds had been "specified" for expenditure. App., *infra*, 37a. The court did not confront the implications of equating "use" with "expenditure"—an approach that would make it impossible to attach funds before they are "used for" loan repayment, and equally impossible to attach them later because the funds will no longer be in the debtor's possession. Moreover, as shown below, petitioners were denied discovery on which BCRA funds had in fact been "specified" for expenditure.

Finally, despite repeatedly citing alleged gaps in the record as reasons to vacate the restraining notices and orders of attachment, the court of appeals held that petitioners were not entitled to limited discovery to fill those gaps. That denial of all discovery concerning Argentina's and BCRA's assertion of sovereign immunity relied on Second Circuit precedent holding that plaintiffs should generally be allowed "limited discovery with respect to the jurisdictional issue" but should not be allowed "*other* discovery" unless the limited discovery reveals "a reasonable basis for assuming jurisdiction" over a foreign state. *First City, Texas-Houston, N.A.* v. *Rafidain Bank ("Rafidain I")*, 150 F.3d 172, 177 (2d Cir. 1998) (quoting *Filus* v. *Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990)) (emphasis added). But the court overlooked that EM actually was seeking *post-judgment* discovery following a lawsuit that in fact established a basis for assuming jurisdiction over Argentina—namely, Argentina's issuance of the bonds underlying the over $700 million judgment in EM's favor against Argentina. Moreover, the court not only refused to authorize the broad, "other" discovery warranted in the post-judgment context, but also refused to authorize even the minimum "limited discovery" that the courts of appeals routinely allow in virtually all cases implicating the FSIA. Instead, while relying on a record petitioners were not permitted to develop, it concluded that petitioners were not entitled to *any* discovery. App., *infra*, 39a-40a.

## REASONS FOR GRANTING THE PETITION

This case involves, in the attachment context, the FSIA's "most significant" exception, namely, its "commercial activity" carve-out of sovereign immunity. See *Weltover*, 504 U.S. at 611 (issuance of bonds is a commercial activity). The context, moreover, amplifies that exception's significance. Sovereign debtors, such as Argentina, frequently "take purposeful advantage of their de facto immunity to walk away from legal and financial obligations." Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J.

INT'L L. 311, 316 (2005). An overly narrow application of the FSIA's "commercial activity" exception, therefore, would unduly weaken one of the few bulwarks standing between sovereign debtors and freedom to ignore or flout the judgments of American courts, as Argentina has done in this case.

This Court's attention is necessary to address this problem because the FSIA (implicitly) delegates to the judiciary responsibility for interpreting many of the FSIA's most critical provisions. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 359 (1993) (exercise of police power is not a commercial activity). The present case concerns three terms that the FSIA leaves "largely undefined," *Weltover*, 504 U.S. at 612, and an additional issue that the FSIA does not meaningfully address: What is "[1] property of a foreign state * * * [2] used for [3] a commercial activity," 28 U.S.C. § 1610(a), (d), and [4] are post-judgment creditors in FSIA litigation entitled to any discovery?

Although it is perhaps unremarkable that the FSIA's text does not explicitly answer those questions, it is striking that the lower court's answers departed so dramatically from the decisions of so many other courts and from the FSIA's legislative history. In creating or deepening three circuit splits, the Second Circuit reached four misguided conclusions. First, it read into the FSIA a rule that foreign states virtually cannot, even by decree—and even under an obligation to repay the central bank—convert central bank property to their own. Second, it ignored case law defining "commercial activity" and the FSIA's legislative history, which explicitly states that all borrowing is commercial in nature. Third, it held that a foreign state may set aside a large pot of money for the repayment of one creditor without subjecting that pot to attachment by other creditors. And fourth, it held that a post-judgment creditor who has previously established jurisdiction over a sovereign debtor can be denied discovery altogether in an execution action, thereby rejecting the consensus view that virtually all plaintiffs are entitled at the very least to jurisdictional discovery.

The consequence of these holdings will be to permit Argentina to prepay its IMF debt while withholding from petitioners $105 million in other assets designated for loan repayment. Although that amount represents only a fraction of petitioners' judgments against Argentina, it is $105 million more than Argentina is willing to pay toward those judgments. Petitioners have sought since 2003 to find assets to satisfy the judgments that Argentina *invited* when it agreed to jurisdiction and waived sovereign immunity in the underlying debt instruments. During that time, Argentina has sought to render those agreements "totally illusory," to borrow Judge Griesa's phrase (App., *infra*, 104a), by removing attachable assets from the jurisdiction. Given those cynical tactics, Argentina perhaps regrets that the Decrees earmarked all of the Unrestricted Reserves, *including those in the United States*, for repaying international monetary authorities. That, however, is clearly what the Decrees did. By holding that the FSIA should be interpreted to ignore that reality, the decision below rewarded behavior that was not only cynical, but clumsy as well.

The decision's implications will also be severe throughout the Second Circuit—which, as this Court noted in a prior case involving Argentina's default on its debts, includes New York City, a "'world financial leader,'" *Weltover*, 504 U.S. at 618. Now, in the Second Circuit, foreign states that have "explicitly waived [their] immunity from attachment," 28 U.S.C. § 1610(d)(1), will nevertheless have four new means of frustrating disfavored creditors: (1) funneling foreign state property through central banks; (2) preferring public creditors to private ones; (3) designating large, undifferentiated sums of money from which to pay preferred creditors; and (4) stonewalling plaintiffs in discovery. Although Argentina employed *all* of those tactics here, successfully employing *any one of them* will now permit other sovereign debtors—or, quite possibly, Argentina yet again, see App., *infra*, 5a-7a n.2—to shield from attachment assets that do not warrant protection under the FSIA.

Sovereign debtors should not be given those new tools—none of which is mandated by the FSIA—to avoid paying their legitimate debts. Opportunities to collect from sovereign debtors already are exceedingly rare. As one leading scholar (and the author of the leading text on international finance) has explained, both overborrowing and nonpayment "result[] from the fact that sovereigns face few consequences as a result of default." Hal S. Scott, *Sovereign Debt Default: Cry for the United States, Not Argentina*, Washington Legal Foundation, Working Paper Series No. 140, at 1 (Sept. 2006), available at http://atfa.org/resources/scott_wp.pdf. The Second Circuit's narrowing of the FSIA's commercial activity exception weakens one area in which Congress specifically provided that a foreign sovereign's default on debt obligations *should* have consequences.

That undue expansion of immunity, moreover, will disproportionately advantage foreign sovereigns who regard the FSIA as something to exploit. President Kirchner, for example, sees the FSIA's immunity provisions not as a font of U.S.-Argentine goodwill but instead as an opportunity to "snub the West without cost" and thereby appeal to his constituency's anti-Americanism. Scott, *Sovereign Debt Default*, *supra*, at 38. Thus, because it is so susceptible to abuse, the decision below upsets the proper balance between respecting foreign sovereigns and, as Congress specified, holding them accountable for their commercial activities.

## I. By Directing that Unrestricted Reserves Held by the Central Bank Be Used to Repay One Creditor of Argentina, Argentina Changed the Status of Those Reserves so as to Make Them Attachable by Other Creditors of Argentina

The court of appeals' narrow view of what constitutes foreign state "property" would enable foreign states to use assets for commercial activities while simultaneously shielding them from attachment. Specifically, the court ruled that central bank assets diverted by foreign states to their own use are not foreign

state property and, accordingly, are immune from attachment *even if* used for the foreign state's commercial activities.

The court's sweeping conclusion was motivated by a belief that a contrary conclusion might render all assets held by central banks attachable "absent otherwise-applicable sovereign immunity protections." App., *infra*, 21a n.12. That concern overstates petitioners' litigation position and downplays the FSIA's protections. First, petitioners do not contend that *routine* directives to central banks to return assets to a government for *governmental* activities convert ownership of those assets in any relevant fashion. Nor do they contend that a foreign state's *mere authority* to appropriate central bank assets for commercial activities exposes to attachment funds that have not actually been appropriated for those activities. Rather, they contend that a *particular* directive to a central bank to use part of its assets to *repay a nation's external debt* makes *those assets* available to repay other creditors. That is a much narrower theory than the court attributed to petitioners. And, although the directive in this case allocated $8.4 billion in reserves, the "vast[ness]" of that amount (*id.* at 20a n.11) is attributable to the breadth of the Decrees, not to overreaching by petitioners.

Second, the vastness of a particular cache of funds is an exceedingly weak reason to conclude that those funds are not foreign state "property." Every nickel owned by a foreign state and kept in the United States is potentially subject to attachment, "*absent otherwise-applicable sovereign immunity protections*." App., *infra*, 21a n.12 (emphasis added). That fact is no cause for alarm, however, because the immunity protections for foreign state property are so strong. For example, the court expressed a concern that assets in the United States Federal Reserve System "would" be treated as attachable interests of the United States because the United States has authorized transfers of "surplus funds" to the Treasury. *Ibid.* However, there is no hint of commercial activity in that conduct, and thus no reason to suppose that the FSIA would inadequately protect those assets.

There is yet another layer of protection for such assets because of the central bank immunity provided by 28 U.S.C. § 1611(b)(1). Section 1611(b)(1) affords immunity to "the property of a foreign state * * * *if* * * * the property is that of a foreign central bank or monetary authority *held for its own account*" (emphasis added). Whereas Section 1611(b)(1) would strengthen the protections for the assets in the court's hypothetical example, that provision counsels strongly against ignoring foreign state ownership of funds *held* by a central bank but *used* for a foreign state's commercial activities.

The legislative history of Section 1611(b)(1) reveals that the attached assets in this case were not held for BCRA's "own account." That history explains that the FSIA's central bank immunity "applies to * * * funds used or held in connection with central banking activities, *as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states*." H.R. REP. 94-1487, at 31, *reprinted in* 1976 USCCAN at 6630 (emphasis added). The Unrestricted Reserves fit the language the legislative history employs to describe the *opposite* of funds held for a central bank's "own account." Under the Decrees, the Unrestricted Reserves are used to finance repayment of Argentina's debts to multilateral lenders, including its IMF loan. Had the court considered that the FRBNY funds were no longer held for the Central Bank's own account within the meaning of Section 1611, it might not have felt impelled to reach the implausible and unsupported conclusion that the Central Bank had the only relevant ownership interest in funds being used to pay *Argentina*'s debt.

The court did not square its holding with the language and legislative history of Section 1611, and its one attempt to provide legal support for that holding is undermined by the very authorities it cited. The court stated that "[c]orporate law principles * * * apply by analogy to the relationship between the Republic and its instrumentality [the central bank]." App., *infra*, 21a-22a. Applying those principles, the court correctly observed that a corporation's shareholders "cannot transfer or assign the

corporation's properties and rights, nor apply corporate funds to personal debts." *Id.* at 22a (quoting 1 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 31, at 78, 84 (rev. ed. 2006)). Yet the court failed to recognize that applying "corporate funds"—assets held by the central bank—to a "personal debt[]"—Argentina's debt to the IMF—is *exactly* what the Decrees did. What *necessarily* follows is that Argentina was *not* acting as a mere shareholder when it did that which a mere shareholder cannot do. The Decrees thus *altered* the pre-existing relationship between Argentina and its central bank in exactly the way that matters: they made "corporate" (central bank) funds available to pay "personal" (Argentina's) debt. For precisely that reason, *any* creditor of Argentina—not just the one creditor Argentina wished to pay—should have had a claim on the Unrestricted Reserves.

Moreover, Argentina's issuance of a note documenting its obligation to *repay* the Central Bank for the money it paid to the IMF *confirms* that the Decrees diverted the Unrestricted Reserves from central bank uses to Argentina's use. Had this been a routine instance of "any time the foreign state issues directives affecting the central bank's reserves," App., *infra*, 21a, Argentina would not have needed to take any additional steps with respect to the IMF repayment. By issuing that note, Argentina *acknowledged* that its Decrees directed the Central Bank to use assets not for central bank activities. And the particular activity Argentina had in mind—repaying Argentine commercial debt—is precisely what petitioners claim those funds should be available for now.

The Second Circuit's contrary position threatens broad implications for FSIA litigation. To say that Argentina could direct its central bank to repay a debt—*regardless of whether it was commercial in nature*—without in any way affecting ownership or control of the assets designated for repayment of that debt, is to give recalcitrant sovereign debtors a roadmap to pick and choose which of their valid *commercial* debts they will repay (using assets in the United States), and which they will continue

to ignore. To avoid the legal system, they need only funnel their repayments through their central banks. Courts of the United States need not cede such power to foreign debtors that have validly subjected themselves to the jurisdiction of U.S. courts, especially where, as here, that debtor nation is explicitly flouting the valid judgments of a U.S. court.

## II. The Second Circuit's "Commercial Activity" Analysis Cannot be Reconciled with the Decisions of Other Courts of Appeals or with the FSIA's Structure and Legislative History

The Second Circuit adopted a "commercial activity" analysis that is out of step with the decisions of this Court and other courts of appeals. An activity is "commercial [in] character" if it is the *type* of activity in which a private party can engage, as opposed to the exercise of a peculiarly sovereign power. See *Weltover*, 504 U.S. at 614; 28 U.S.C. § 1603(d). The court determined that the type of activity in which Argentina had engaged was borrowing and repaying money *from and to the IMF*, as opposed to borrowing and repaying money in general, and that such activity exercised a sovereign power. The court provided no explanation for defining the "type" of activity and the nature of sovereignty in such a particularized way.

In contrast, other courts of appeals have consistently defined the relevant "type" of activity at a higher level of generality and the universe of "sovereign powers" with more circumspection. Their broad, bird's-eye approach closely adheres to this Court's FSIA decisions and, accordingly, to the restrictive theory of sovereign immunity codified in the FSIA. Indeed, the Second Circuit's holding in this case not only chafes against the decisions of its sister circuits, but is *foreclosed* by the FSIA's legislative history, which regards all borrowing as commercial.

Furthermore, Section 1603(d)'s mandate to consider whether an activity is commercial in "character" applies here only because Congress *elected to omit* from the FSIA a provision of the original bill that would have created immunity

for claims involving "public debt" that was incurred by a foreign state for "general governmental purposes." H.R. 11315, 94th Cong., 1st Sess. (Dec. 19, 1975) (proposed § 1606). The Judiciary Committee dropped the public-debt provision because it "would serve no significant purpose and *would be inappropriate*." H.R. REP. 94-1487, at 10, *reprinted in* 1976 USCCAN at 6609 (emphasis added). By assessing commercial character at the wrong level of generality—*i.e.*, focusing on "borrowing from the IMF" instead of simply "borrowing"—the Second Circuit has effectively created the very immunity Congress deemed "inappropriate," and declined to enact.

### A. The Court of Appeals Misunderstood the Type and Nature of the Activity at Issue

If the opinion below is permitted to stand, foreign states litigating in the Second Circuit will be able to characterize as "sovereign" governmental conduct that, in other circuits, is duly recognized as merely incidental to commercial activity. The court below concluded that, because IMF borrowing is exclusive to nations, it is not a commercial activity but instead the exercise of a sovereign power called "borrow[ing] from the IMF." App., *infra*, 33a. Likewise, the court concluded that, because the IMF often attaches conditions to its loans—hardly a remarkable feature of loans to debtors with bad credit—IMF borrowing is "regulatory in nature." *Id.* at 34a.

That approach conflicts with the analytical framework that has evolved in the courts of appeals following *Weltover* and *Saudi Arabia* v. *Nelson*. Those decisions explained that the FSIA aimed to restrict immunity to a foreign state's "sovereign acts," *Weltover*, 504 U.S. at 613, 614; *Nelson*, 507 U.S. at 359, and that, as a result, conduct is commercial in nature unless it "boils down" to the exercise of some sovereign *power*, *Nelson*, 507 U.S. at 361. *Weltover* and *Nelson* did *not* hold that an act is commercial only if a private party could have performed *that act*. Instead, the Court emphasized that an activity is commercial if a private actor could have engaged in conduct of the same "manner" (*Weltover*, 504 U.S. at 614), "*type*" (*ibid.*),

"sort" (*Nelson*, 507 U.S. at 362), or "kind" (*id.* at 360, quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1987)).

Although assessing an activity's "type" is perhaps more art than science, the obligation to make that assessment reflects the FSIA's mandate to avoid approaching the term "commercial activity" with tunnel vision. Thus, instead of asking whether a private party could have done *exactly* what the foreign state did, courts must seek to identify "analogous" private conduct. *Weltover*, 504 U.S. at 616. *Weltover*, for example, involved a bondholder's suit based on a presidential decree extending the maturity dates on certain government bonds. But *Weltover* did not recognize a "sovereign power" to issue government bonds or decrees concerning them, even though private parties obviously cannot do those things. Indeed, although "a presidential decree is clearly not commercial activity," *Weltover* held that "the issuance of the bonds was" one. *Adler* v. *Federal Republic of Nigeria*, 107 F.3d 720, 725 (9th Cir. 1997); see also *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 698-699 (1976) (plurality opinion) (construing as "commercial" a foreign state's repudiation of its debt).

Taking their cues from this Court, other courts of appeals regard as commercial an activity—even one accomplished through sovereign channels, such as the presidential decree in *Weltover* or the repudiation in *Alfred Dunhill*—if there is some analogous "manner," "type," "sort," or "kind" of private commercial activity. *E.g.*, *Sun* v. *Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000) (commercial activity inquiry must identify "a category of conduct"). In their view, conduct that approximates a private commercial transaction is "commercial" *even if the transaction entails conduct that no private player can duplicate.*[1] On the other hand, conduct is sovereign only if it invokes

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[1] See, *e.g.*, *Samco Global Arms, Inc.* v. *Arita*, 395 F.3d 1212, 1216 (11th Cir. 2005) (contract calling for storage of weapons by the Honduran Armed Forces was commercial); *Globe Nuclear Servs. & Supply, Ltd.* v. *AO*

some broadly defined and widely recognized power inherent in governance. Thus, just as the use of the police power was deemed non-commercial in *Nelson*, so too are the exercise of eminent domain and payment of war reparations.[2]

By approaching the commercial activity exception at a high level of generality, the courts of appeals avoid creating "a cloak of protection over typical commercial activities." *Cicippio* v. *Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994). The court below did just the opposite; it overlooked the "type" of activity involved in IMF lending and instead deemed "sovereign" the aspects of IMF lending that are analogous but not identical to private conduct. For example, although the enforcement of a debt is obviously commercial conduct, the court reasoned that IMF loans are "vehicle[s]" for sovereign conduct because they are enforced by foreign states. App., *infra*, 35a. That reasoning, however, requires the unwarranted assumption that an activity that is commercial in nature when undertaken by

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*Techsnabexport*, 376 F.3d 282, 289 (4th Cir. 2004) (contract of Russian Federation to supply private company with uranium extracted from nuclear weapons was commercial); *Sun*, 201 F.3d at 1108, 1109 (cultural tours were commercial, even if "no private party would sponsor a non-profit cultural tour to foster ties with individuals of Chinese descent overseas and promote understanding of Chinese culture," because "[n]o private party would refinance government debt either, but the Supreme Court has held this activity to be commercial"); *Janini* v. *Kuwait Univ.*, 43 F.3d 1534, 1537 (D.C. Cir. 1995) ("That the termination [of an employment contract] here may have been accomplished by a formal decree of abrogation does not affect its commercial nature."); *Walter Fuller Aircraft Sales, Inc.* v. *Republic of Philippines*, 965 F.2d 1375, 1385 (5th Cir. 1992) (contract to sell airplane was commercial, even though it was part of a governmental effort to recover ill-gotten gains of the previous regime); *McDonnell Douglas Corp.* v. *Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir.1985) (contract to supply Iran with military aircraft parts was a commercial activity); see also *Virtual Def. & Dev. Int'l Inc.* v. *Republic of Moldova*, 133 F. Supp. 2d 1, 4 (D.D.C. 1999) (contract for the sale of MiG-29 fighters was a commercial activity).

[2] See, *e.g.*, *Beg* v. *Islamic Republic of Pakistan*, 353 F.3d 1323, 1326 (11th Cir. 2003) (eminent domain); *Wolf* v. *Federal Republic of Germany*, 95 F.3d 536, 543-544 (7th Cir. 1996) (war reparations).

a single nation somehow becomes non-commercial if nations do it collaboratively.

Not only does the Second Circuit's approach threaten an undue expansion of sovereign immunity, but it is also unworkable. Almost all commercial conduct by a foreign state, including the quintessentially commercial act of repaying a loan, will involve some conduct that could be labeled "sovereign." Likewise, a foreign state will "almost always be able to characterize its activities as sovereign 'regulation' of some subject matter related to the conduct at issue." *Globe Nuclear Servs. & Supply, Ltd.* v. *AO Techsnabexport*, 376 F.3d 282, 290 (4th Cir. 2004) (holding that contracting for uranium in a way "no private player can" did not "regulate" the uranium market). "[That] usage of 'regulation' is not only inconsistent with the Supreme Court's decision in *Weltover*, but would also strip the 'commercial activity' exception of much, if not all, of its meaning." *Ibid.* Lax usage of the terms "sovereign" and "regulatory" is precisely what plagues the Second Circuit's decision. Unlike its sister circuits, the court below ignored this Court's instruction to focus on the type of activity in which a foreign state has engaged and, consequently, unduly lowered the bar for showing a sovereign, non-commercial act.

### B. The FSIA's Structure and Legislative History Show that Repaying a Loan is a "Commercial Activity"

In addition to discarding the prevailing analytical tools for interpreting the commercial activity exception of Section 1610, the decision below also erred in answering the specific question before it: whether IMF debt escapes the general rule that the issuance and repayment of debt is not "categorically different from other [commercial] activities of foreign states." *Weltover*, 504 U.S. at 615. Although *Weltover* arguably left that question open, see *ibid.*, the FSIA's structure and legislative history provide great clarity.

For example, Section 1611(a) of the FSIA created an explicit exception to the attachment rules specified in Sec-

tion 1610 for funds being *disbursed to* or at the direction of a foreign state from an organization designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act. *The IMF is such a designated organization.* Executive Order 9751, 11 Fed. Reg. 7713 (July 11, 1946). If sovereign borrowing activities from organizations such as the IMF did not fall within the attachment rules of Section 1610 because they were "governmental" rather than "commercial" activities, there would have been no need for such a provision. Moreover, Congress specifically decided to protect property of the IMF, or similar organizations, used for making loans to foreign states but *not* property of a foreign state earmarked for repaying such a loan. The Second Circuit's decision has effectively rewritten that statute.

Similarly, the House Report states: "Activities such as a foreign government's * * * borrowing of money * * * would be among those included within the definition" of commercial activity. H.R. REP. 94-1487, at 16, *reprinted in* 1976 USCCAN 6604, 6615. The report places no limitations on *which* borrowing will be deemed "commercial," but says that *all* borrowing is of the relevant "type." The House Report also explains:

> This definition [of commercial activity] includes * * * an indebtedness incurred by a foreign state * * * which receives financing from a private *or public* lending institution located in the United States—for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States.

*Id.* at 17, *reprinted in* 1976 USCCAN at 6615-6616 (emphasis added).

Thus, although the court of appeals gave no explanation for holding that the relevant type of activity was borrowing *from the IMF*, there is authoritative guidance *contrary* to the court's choice. "Borrowing," not borrowing from a particular lender, is

the relevant type of activity, and the House Report specifically forecloses a distinction between private and public lenders.

The House Report also dislodges another pillar of the Second Circuit's holding. The court believed IMF loans could be distinguished from the government bonds in *Weltover* because IMF loans take the form of currency exchanges instead of "debt instruments." App., *infra*, 35a. Aside from ignoring the fact that currency exchanges are themselves commercial activity in which any private commercial actor could engage, the court's assertion overlooked the House Report's broad statement that all "*financing* from a * * * public lending institution"—and not simply the issuance of typical debt instruments—is commercial in nature. H.R. REP. 94-1487, at 17, *reprinted in* 1976 USCCAN at 6615-6616 (emphasis added). The House Report was careful to mention "loans, guarantees or insurance" as illustrative "example[s]" drawn from the larger universe of "indebtedness incurred by a foreign state." *Ibid.* Whatever form IMF loans might take, they indisputably denote "indebtedness."

## III. The Second Circuit's Definition of "Use" Creates a Circuit Conflict and Would Make it Impossible to Attach Loan-Repayment Assets Until it is Too Late

The lower court's holding that assets designated for loan repayment are not "used for" loan repayment helps to demonstrate the exceptional importance of this case. Defaults by debtor nations in general, and Argentina in particular, are a significant worldwide problem. Creditors that Argentina (or any other debtor nation) should be repaying have relatively limited opportunities to find assets being used by the debtor nation for a commercial activity in the United States. When the commercial activity in question is repayment of debt—the very thing Argentina is *refusing* to do here, and characteristically the very reason why creditors resort to attachment—it is important that legal rules sensibly identify property that is being *used for* but not (or not yet) *spent on* that activity. Otherwise, if the only way to attach assets is to show that those exact assets *have been transferred* to another creditor, it is impossible for the non-

preferred creditor to attach the assets. The preferred creditor gets to keep them, and the effect is to give the debtor unilateral authority to decide *which* among its valid creditors it will repay with its assets in the United States.

It is not surprising, therefore, that the Second Circuit stands alone in its approach to assessing whether assets that are not expended for a commercial activity may nevertheless be "used for" that activity. Whereas the court below asked whether the FRBNY funds were at some point singled out from among the Unrestricted Reserves for repaying the IMF, the Fifth Circuit views the relevant inquiry as whether the attached assets "were * * * cordoned off for use of the [foreign state] in its sovereign capacity." *Af-Cap, Inc.* v. *Republic of Congo*, 383 F.3d 361, 370 (5th Cir.), on rehearing, 389 F.3d 503 (5th Cir. 2004), cert. denied, 544 U.S. 962 (2005).

There is no possible argument that the FRBNY funds were cordoned off for sovereign use. Quite the contrary, they were part of the Unrestricted Reserves that the December 15 decrees specifically allocated *from* central banking uses—or any other use—*to* the non-sovereign use of repaying *Argentina*'s debt to the IMF. To be sure, the IMF debt was not in fact repaid with FRBNY funds—it could not have been, because they were attached—and Argentina claims (in a proposition plaintiffs have no way of testing without discovery, which the courts below denied, see App., *infra*, 39a-40a) that the FRBNY funds were never earmarked for that purpose. But the Decrees do not reflect that claim; they freed all of the Unrestricted Reserves—and not just the particular pesos, dollars, or Euros ultimately expended to repay the IMF—for *Argentina*'s repayment of its IMF debt.

The Second Circuit acknowledged that the Decrees made "*all* BCRA funds" eligible for loan repayment, yet still believed that more "specific designation * * * would be necessary" to constitute "use" of those funds. App., *infra*, 37a. That analysis—under which only particular dollars, rather than the larger sum from which those dollars are drawn, can ever be "used" for loan repayment—is inconsistent with Fifth Circuit case law. In

*Af-Cap*, because the Congo had *previously* "diverted" to a commercial activity *portions* of its revenue from certain tax and royalty obligations, the Fifth Circuit concluded that *the entire present revenue stream* from those obligations "[is] used for" a commercial activity and thus subject to attachment. 383 F.3d at 370. Here, not only were portions of the Unrestricted Reserves actually diverted, as in *Af-Cap*, but that diversion was not mere happenstance, but instead the result of emergency presidential decrees specifically designating all of the Unrestricted Reserves for that use. It was thus Argentina's calculated decision to put *all* of the money it designated "in service of [a] commercial activity." *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 258 (5th Cir. 2002).

The Fifth Circuit's conclusion that an entire sum of money is "used" when a portion of that sum is expended is consistent with common sense. See *Conn. Bank of Commerce*, 309 F.3d at 254 ("[A person] *earns* his salary from his job, but he *uses* it to pay the rent, buy groceries, and so forth."). More important, *it avoids extending immunity to assets that do not warrant FSIA protection*: "[T]he availability of this property for whatever purpose—commercial or otherwise—[a sovereign] deems appropriate [makes s]uch property seem[] hardly the type of foreign property the FSIA was designed as a shield to protect, i.e., funds so central to a nation's operations as a sovereign that uses thereof would 'interrupt[] the public acts of [this] foreign state.'" *Af-Cap*, 383 F.3d at 370-71. The Unrestricted Reserves perfectly fit the description of property not deserving of FSIA protection. As Professor Scott described the FRBNY funds:

> The attachment was not aimed at central bank reserves generally, just funds that were to be *used for* debt repayment. These funds were not being used to invest in U.S. Treasury bills or to support the Argentine currency. They were in the process of being withdrawn—the question was who should have them, the IMF or private creditors.

Scott, *Sovereign Debt Default*, *supra*, at 30 (emphasis added).

Although the Second Circuit acknowledged what it termed Argentina's "diplomacy of default,"App., *infra*, 5a n.2, it rewarded Argentina's imprudent drafting of the Decrees. In the court's view, the magnitude of the Unrestricted Reserves cut against deeming them to be attachable. *Id.* at 20a n.11. Argentina could have "cordoned off," *Af-Cap*, 383 F.3d at 370, any assets it wanted for sovereign uses while also designating different assets for the commercial activity of repaying the IMF. It did not. Thus, the broad implications that worried the court of appeals cannot be traced to a novel legal theory advanced by petitioners. Rather, they lie at Argentina's doorstep; Argentina *chose* to expose the FRBNY funds after removing other attachable assets from the jurisdiction, and Argentina's defaults have created numerous valid creditors. See *id.* at 369 n.8 ("[I]t would be appropriate for a court to consider whether the use of the property in question was being manipulated by a sovereign nation to avoid being subject to garnishment under the FSIA."). Argentina's designation of billions of dollars for a commercial activity, and failure to exclude from its designation assets in the United States, constituted "use" under the FSIA of all the Unrestricted Reserves, including the FRBNY funds.

In concluding otherwise, the Second Circuit created a circuit conflict and rewarded Argentina for behavior that should have been penalized. To save Argentina from itself, the court turned bad Argentine diplomacy into bad American law.

## IV. The Second Circuit's Refusal to Permit Discovery by Petitioners, while Holding Against Petitioners the Undeveloped Factual Record Below, Creates a Circuit Split and Violates Due Process

The Second Circuit's holding that petitioners were entitled to *no discovery at all*, and that the absence of evidence EM had sought in discovery cut in *Argentina*'s favor, conflicts with the decisions of numerous courts of appeals. Those decisions establish that plaintiffs in FSIA litigation are normally entitled to the sort of targeted discovery that petitioners were denied here, see App., *infra*, 10a n.5, and that post-judgment creditors

are in fact entitled to a full complement of discovery. Those holdings follow from the FSIA's purpose, this Court's decisions concerning discovery, and the due process rights of plaintiffs.

The FSIA's legislative history emphasizes that a foreign state's *potential* immunity from suit does not justify proceeding as though the foreign state were immune. Rather, "[t]he ultimate burden of proving immunity * * * rest[s] with the foreign state." H.R. REP. 94-1487, at 17, *reprinted in* 1976 USCCAN at 6616. A judgment entered against a foreign state, therefore, signifies that state's failure to carry its burden. Moreover, although the FSIA's attachment provisions create some measure of protection for sovereign assets, they do not "vest in [a foreign sovereign] a 'right' not to pay a valid judgment" by reopening the jurisdictional battle it has already lost. *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992). Thus, once a court determines that "subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction *continues* long enough to allow proceedings in aid of [a] money judgment." *First City, Texas-Houston, N.A.* v. *Rafidain Bank ("Rafidain II")*, 281 F.3d 48, 54 (2d Cir. 2002) (emphasis added).

Allowing "full" post-judgment discovery against a sovereign debtor, therefore, "[does] not intrude upon * * * sovereign immunity." *Rafidain I*, 150 F.3d at 177; see also *Richmark Corp.*, 959 F.2d at 1478. The court below, however, denied not only full discovery but *all discovery*, based on case law holding that "'discovery should be ordered circumspectly'" when a foreign state's immunity *has not previously been adjudicated.* App., *infra*, 39a (quoting *Rafidain I*, 150 F.3d at 176).

Even if the court below had been justified in proceeding as if petitioners were seeking *jurisdictional* discovery, as opposed to discovery concerning the assets of a non-immune debtor, its complete curtailment of that discovery would not have been warranted. To be sure, other courts of appeals have instructed district courts to "limit[] [jurisdictional discovery] to the essentials necessary to determining the preliminary question of jurisdiction." *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853

F.2d 445, 451 (6th Cir. 1988), cert. dismissed, 503 U.S. 978 (1992). That instruction, which concerns how district courts should exercise their discretion to control jurisdictional discovery, does not authorize district courts to eliminate discovery entirely when facts critical to an immunity determination are at issue. *Limited* discovery is manifestly not the same as *no* discovery, and no court of appeals other than the court below has held otherwise.

Indeed, "where issues arise as to jurisdiction or venue, discovery *is available* to ascertain the facts bearing on such issues." *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 351 n.13 (1978) (emphasis added). Thus, the D.C., Third, Fifth, Sixth, Seventh, and Ninth Circuits have concluded that a plaintiff against whom a defendant invokes sovereign immunity "must [be] give[n] * * * '*ample opportunity* to secure and present evidence relevant to the existence of jurisdiction.'" *Phoenix Consulting Inc.* v. *Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (quoting *Prakash* v. *Am. Univ.*, 727 F.2d 1174, 1179-1180 (D.C. Cir.1984)) (emphasis added).[3] The discovery

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[3] See *Fed. Ins. Co.* v. *Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1284 n.11 (3d Cir. 1993) ("We agree with other courts of appeals that * * * the parties should be granted a fair opportunity to engage in jurisdictional discovery" concerning sovereign immunity.); *Conn. Bank of Commerce*, 309 F.3d at 260 n.10 ("[T]he district court may on remand limit any additional discovery to facts relating to the immunity determination."); *Trans Chem. Ltd.* v. *China Nat'l Mach. Import & Export Corp.*, 161 F.3d 314, 319 (5th Cir. 1998) (adopting portion of district court opinion holding that plaintiff was entitled to jurisdictional discovery concerning sovereign immunity); *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d at 451 ("the parties * * * must be afforded a fair opportunity * * * to submit evidence necessary to the resolution of the issues" through "discovery and fact-finding * * * limited to the essentials necessary to determining the preliminary question of jurisdiction"); *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 892 n.2 (7th Cir. 1991) ("[P]laintiffs are entitled to conduct discovery for the limited purpose of establishing jurisdictional facts under the [FSIA] prior to any dismissal."); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992) ("[T]he parties should be allowed to conduct discovery for the limited purpose of establishing jurisdictional facts before the claims can be dismissed.").

afforded to post-judgment creditors should be at least as broad as the ample jurisdictional discovery afforded all plaintiffs in FSIA litigation. See *Rafidain II*, 281 F.3d at 54; cf. *Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007) (declining to decide whether "immunity from discovery is more limited in an execution action than in a liability action," in light of district court's conclusion that the "more than fifteen months of discovery" by a post-judgment creditor had finally "'gone too far'").

The court below asserted that its unprecedented holding was justified because the record "ma[de] clear that the FRBNY Funds were never an attachable asset of the Republic and that § 1610's 'commercial activity' exception to immunity from attachment does not apply." App., *infra*, 39a-40a. Once again, that line of reasoning finds no support in the case law. Discovery can be denied if a plaintiff's allegations are vague or frivolous, which petitioners' claims are not.[4] Discovery cannot be denied, however, based on a court's judgment that assessing an undeveloped factual record is preferable to imposing modest production burdens on a non-immune defendant concerning *assets* that might be immune from attachment.

Moreover, the Second Circuit's own characterization of the record in this case undercuts its assertion that discovery would not have mattered. The Second Circuit repeatedly based its holdings in favor of Argentina on the lack of evidence in the

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[4] Cf. *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 536, 537 (5th Cir. 1992), *cited in* App., *infra*, 39a, 40a (plaintiff was not entitled to "massive discovery" based on "generalized" and "self-contradictory" conspiracy allegations); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 783 (S.D.N.Y. 2005) (ordering discovery against some sovereign defendants and not others in case in which plaintiffs indiscriminately tried to blame many sovereign entities for terrorist attacks on World Trade Center and Pentagon); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 553 (S.D.N.Y. 2005) (with respect to another sovereign entity, "Plaintiffs have not identified a factual dispute that would require jurisdictional discovery").

record supporting petitioners. In assessing who controlled the FRBNY funds, for example, the court asserted that: petitioners had not "point[ed] to any order or other document" aside from the Decrees that reflect a transfer of ownership from the BCRA to Argentina (App., *infra*, 18a); the record was "barren of any evidence" concerning such a transfer (*id.* at 21a); and petitioners "ha[d] not demonstrated" that Argentina held an attachable interest in the FRBNY funds (*id.* at 22a n.13). Likewise, the court's "commercial activity" analysis relied on a conclusion that "the record is barren of any evidence that the FRBNY Funds were to be 'used for' repayment of the IMF" (*id.* at 4a)—because, "on the present record," the court believed that there was "no evidence" of actual use or designation for use of the FRBNY funds (*id.* at 32a, 36a). Based on the missing evidence, the very subjects of EM's discovery request, the court reached the exceedingly guarded conclusion that "the Decrees alone" did not render the FRBNY funds attachable by Argentina's creditors. *Id.* at 37a.

Thus, although the court below stated that additional evidence would have made no difference for petitioners, it repeatedly held against petitioners the absence of such evidence. Accordingly, the opinion itself demonstrates that the five targeted areas of discovery sought by petitioners—concerning the effect of the Decrees and the use of the Unrestricted Reserves (see App., *infra*, 10a n.5)—could have produced relevant evidence concerning the ownership of the Unrestricted Reserves (including the FRBNY funds), how those funds were used or intended to be used, and the nature of that use (for IMF repayment or other commercial activities).

The Second Circuit's reliance on a "barren" record while simultaneously denying petitioners any means to make the record less barren implicates core due process concerns. "[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Société Internationale pour Participations Indus-*

*trielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 209 (1958). Thus, litigants have a due process interest in obtaining evidence supporting their claims, which includes the right not to have claims dismissed due to unwarranted or punitive discovery sanctions. See *Hammond Packing Co.* v. *State of Arkansas*, 212 U.S. 322, 351 (1909) (default judgment did not violate due process because the defendant's "refusal to produce evidence" permitted a "presumption * * * of the want of merit in the asserted defense"); *Hovey* v. *Elliott*, 167 U.S. 409, 419 (1897) (due process was violated by contempt sanction that denied right to be heard); see also Fed. R. Civ. P. 37 adv. comm. note (discovery sanctions under Rule 37 must be in "accord" with *Hammond* and *Hovey*).

The Second Circuit's holding that EM was not permitted to discover evidence in Argentina's possession and that the resulting absence of evidence should be construed *against petitioners* mimics the legal fictions erected as discovery sanctions against recalcitrant litigants. "[G]reat caution should be used," however, "not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald* v. *Mabee*, 243 U.S. 90, 91 (1917) (Holmes, J.). Here, petitioners' attachment orders were dissolved not on the basis of "willfulness, bad faith, or any fault of [petitioners]," but instead based on petitioners' "inability" to collect evidence whose absence the court treated as crucial. *Société Internationale*, 357 U.S. at 212 (a party's inability to comply with a production order is an improper basis for dismissal under Rule 37). That inability, in turn, stemmed from the court's view that petitioners were not entitled to any discovery—a view shared by no other court of appeals.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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